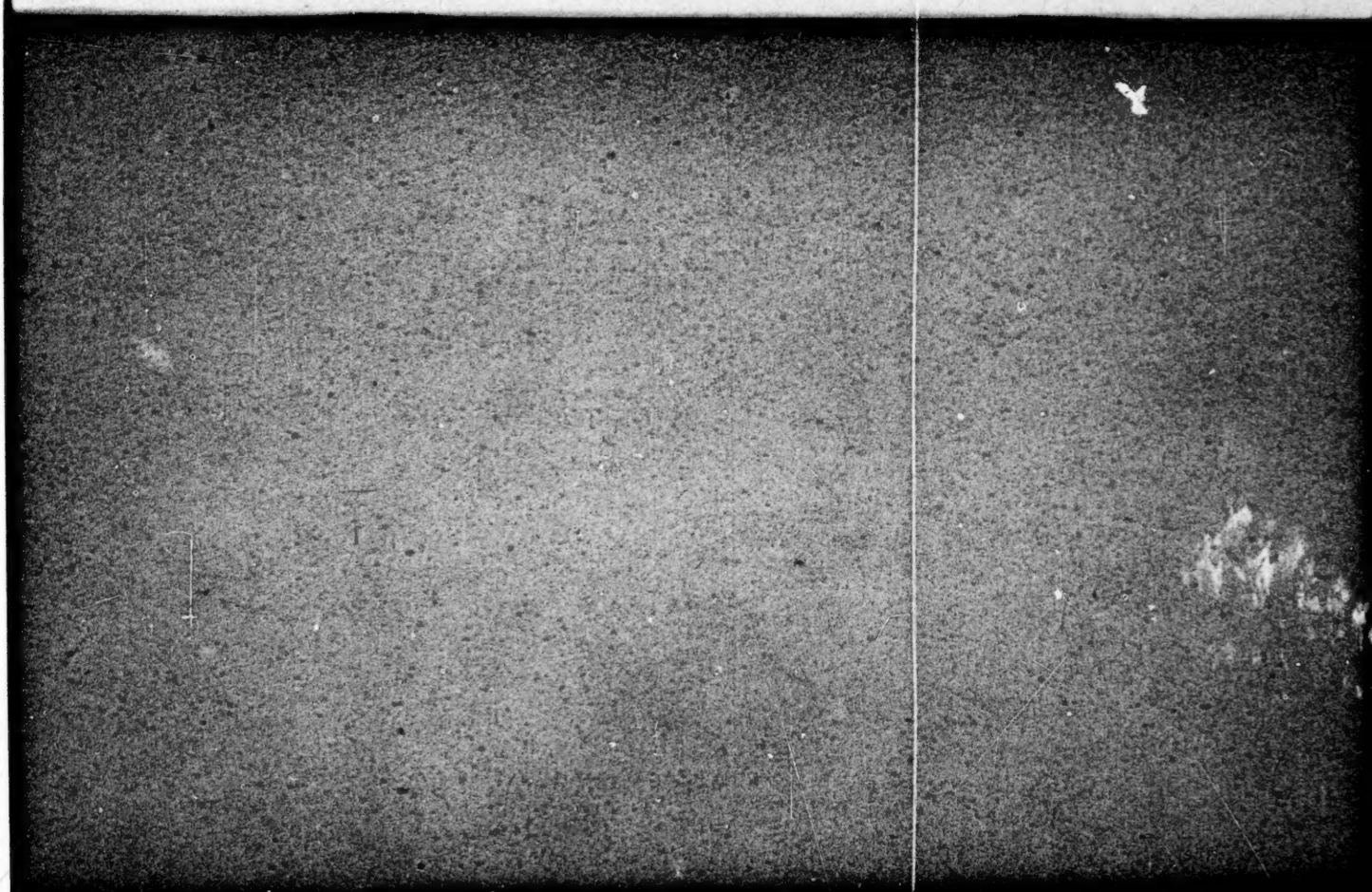

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MICHAEL RODAK, JR., C

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

VS.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

I

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported in 486 F.2d 1084 (1973) (Jt.App. 32).[1]

The denial of petitioner's petition for rehearing en Banc pursuant to Federal Rules of Appellate Procedure 35(b) is found at Jt.App. 39.

[1]The appendix agreed to by petitioner and respondent and printed in a separate pamphlet is referred to herein as "Jt.App.". The appendices at the end of this brief are referred to as Appendix A, Appendix B and Appendix C.

The findings of fact and conclusions of law made by the District Court for the Northern District of California are found at Jt.App. 28.

The Judgment of the District Court for the Northern District of California is found at Jt.App. 31.

II

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered September 7, 1973 (Jt.App. 32).

On November 21, 1973, the United States Court of Appeals for the Ninth Circuit denied petitioner's request for a rehearing en banc (Jt.App. 39).

On February 14, 1974, petitioner sought a Writ of Certiorari, alleging jurisdiction based on Title 28, Section 1331a, Title 28, Section 1254(1), Title 28, Supreme Court Rules, Rule 19(1)(b).

The Petition for a Writ of Certiorari was granted on April 15, 1974.

III

QUESTIONS PRESENTED

(1) Can an employee of an independent contractor, performing unskilled railroad work which is the contractual and franchise responsibility of Southern Pacific Railroad Company, which is under that rail-

road's supervision and control and which uses that railroad's equipment and work area, be an "employee" of that railroad within the meaning of F.E.L.A.?

(2) Does Federal Rules of Civil Procedure 52(a) preclude the Appellate Court from reversing the District Court's factual conclusion regarding F.E.L.A. "employee" status unless the evidence failed, completely, to support the District Court's findings?

IV

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code:

Title 28, FRCP 52:

> . . . Findings of Fact shall not be set aside unless clearly erronious, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.

Title 45, Section 51:

> Liability of common carriers by railroad in interstate or foreign commerce, for injuries to employees from negligence, definition of employees.
>
> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation

or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such in whole or in part from the negligence of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Title 28, Section 1331(a):

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Title 28, Section 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Title 28, Supreme Court Rules, Rule 19(1)(b):

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

V

STATEMENT OF CASE

Petitioner, Eugene C. Kelley, now a paraplegic, was injured July 3, 1963 when he fell from the top level of a three level railroad car while unhooking

automobiles situated on the railroad car. At the time of the accident, petitioner was employed by Pacific Motor Trucking Company,[2] a wholly owned subsidiary of Southern Pacific,[3] who had been engaged by Southern Pacific Company to unload automobiles from its railroad cars.

At the time the accident in question occurred, the petitioner, Eugene C. Kelley, was unhooking an automobile in order that it could be unloaded (Jt.App. 130-131). This procedure was part of the preparatory stage. This preparatory stage included the unhooking procedure, lowering of ramps that connected the railroad cars, and raising the safety railings which were affixed to the railroad cars and which were intended to protect individuals who would be unloading vehicles from the railroad cars (Jt.App. 59-60; 76).

The petitioner, Eugene C. Kelley, was injured during this preparatory stage and prior to the actual driving or unloading of the vehicles (Jt.App. 130-131).

The accident occurred to petitioner while in the process of reaching underneath an automobile in order to unhook chains which were used to maintain the vehicle in a stationary position during transportation. These chains were permanently attached to the railroad car (Jt.App. 56, 59). They were loosened by

---

[2]The paycheck received by personnel unloading automobiles read "Pacific Motor Trucking, wholly owned subsidiary of Southern Pacific" (Jt.App. 70).

[3]No argument is being made that this Court should "pierce the corporate veil."

a ratchet which was also affixed to and a part of the railroad car (Jt.App. 59, 78).

Petitioner fell over the side of the top level of the railroad car, which car failed to have its safety railing in a raised position due to a defective hook (Jt. App. 63).

Petitioner had been doing this exact, unskilled job of unloading automobiles, which were being transported by Southern Pacific Company, for eight years (Jt.App. 131). During this time, all the work was done at the same location which was owned and controlled by Southern Pacific Company, using equipment owned by Southern Pacific Company (Jt.App. 126, 127, 128, 129).

The rate which Southern Pacific Company was *allowed* to charge, pursuant to its franchise, for transporting the automobiles included the unloading of automobiles as was being done by petitioner, Eugene C. Kelley (Jt.App. 5-8, 128).[4]

The responsibility for supervising and controlling the unloading operation of the automobiles was that of Southern Pacific Company (Jt.App. 29-30, Finding of Fact VIII).

Respondent, Southern Pacific Company, treated the personnel at this unloading operation as Southern Pacific "employees" as distinguished from personnel of Pacific Motor Trucking Company who drove trucks

[4]The Ninth Circuit Court of Appeals unfortunately relied on a citation by respondent, Southern Pacific Company, to (R.T. 467) as support for the proposition that unloading charges were "optional." This citation was completely inaccurate (See Appendix C).

or other operations outside of the auto-loading process. 45 U.S.C. §1(7) provides that only "employees" of the railroad may be issued free railroad passes. Each individual who testified at the trial, including plaintiff (p. 440:5) testified that he either had a permanent or had been issued a temporary free railroad pass, the authority for which could only come under 45 U.S.C. §1(7) (Jt.App. 44; 69-70; 89; 134; 143).

Southern Pacific Company supervisors directly and indirectly participated in managing and directing the automobile unloading process.

The instruction, direction, and supervision by Southern Pacific Company, included a booklet prepared by Southern Pacific Company who distributed 1,000 to "new employees." This booklet was designed and distributed to the men who actually unloaded the automobiles (Jt.App. 114-115). Mr. Elwood Jarvis, the supervisor of Damage Prevention Loading Service for Southern Pacific Company, testified regarding his duties in connection with the automobile unloading process at the time of the accident.

> "Mr. Engel: "Q. Now, when you go to the fourth and Channel Street piggyback area, or have in the past, either as an assistant supervisor or a supervisor, do you have any verbal contact with the men themselves who work on the tri-level cars?
>
> "A. Yes.
>
> "Q. And in what way? In other words, what do you do with them?
>
> "A. Well, on loading of vehicles at Fourth and Channel Street, foreign vehicles, we have to

devise a method of adapting the tie-downs on our rail cars to handle foreign automobiles in order that we can carry them by rail without damaging these cars. So we go out and we test load various types of foreign cars and experiment with tie-downs on the vehicles. And we have to have the assistance of the P.M.T. employees to make the various adjustments and tie-downs on the cars for test purposes. So we discuss with them, get underneath the vehicles, or find where on the vehicles we can secure chains, and then make a schematic drawing of the tie-down. They will load the car. We will send a wire to the destination and ask that carrier to make an out-check to see if there was any damage as a result of the tie-downs.

"Q. Now, when you do this, are you in effect showing them where to hook it and so forth?

"A. Correct.

"Q. And this is direct with the men who are actually doing it?

"A. Correct.

"Q. And they follow your instructions in this regard?

"A. They offer advice, too.

"Q. But they also follow your instructions?

"A. Yes. It's a mutual thing. We try to devise the best location" (Jt.App. 117-118).

He also testified that damage to the automobiles occurring during the unloading process was an expense of Southern Pacific Company and their responsibility (Jt.App. 115). Other members of his department also were involved in checking the unloading process including Dick Schriber (Jt.App. 115-116).

Mr. Jarvis was the individual who drafted and distributed, on behalf of Southern Pacific Company, the booklet which he stated was "designed" for "new employees." (See Exhibits 10 and K). Mr. Jarvis stated that the purpose of this booklet which he distributed was to instruct these individuals on how to unload the automobiles (Jt.App. 114-115). Mr. Jarvis admitted he personally physically participated in showing the crew members how to unhook the automobiles (Jt.App. 117-118).

This instructional booklet contained the following rather explicit directions from Southern Pacific Company to the members of the crew involved in the unloading of the automobiles (Jt.App. 80-82):

SAFETY

"Safety of personnel and equipment must be the first consideration. Authorized signs reading 'employees working', white lettering on red background, must be placed at the end of the last rail car before loading or unloading crews start work on each track. Signs must be removed after work is completed and cars ready for movement. White light is to be attached to this sign when used at night. Raise safety rail before working on top deck of rail cars. Do not exceed five miles per hour when driving on rail cars and twenty miles an hour in parking areas. Spring action resulting from excessive speed on rail cars can damage tops and underframes of vehicles. Slower speeds must be observed when necessary for safety. When it is necessary to ascend or descend ladders on rail car, always face the car. Watch your step at all times when on or around cars and

transports. Never throw tools from decks of rail cars or transports to the ground. Make sure bridge plates are raised and locked before rail car is moved." (See petitioner's Exhibit 10, p. 2).

UNLOADING

"When unloading, observe the safety and general rules in the front part of this booklet, being particularly careful to avoid possible roof and underbody damage when driving through rail cars. Always use seat and floor protectors. Park vehicles carefully, closing hoods, deck lids, doors, windows, heater vents and door vent windows, and turning off electrical accessories and lights. Use only wrenches furnished to release rachets. Hammering on ratchet assemblies as an expedient to release chains is prohibited. Hooks must be removed from vehicles by hand." (See petitioner's Exhibit 10, p. 9).

Two fellow crew members of petitioner testified regarding their experiences in receiving directions and instructions from rspondent, Southern Pacific.

Cornelius Oosterbaan testified that he received a copy of the instruction booklet distributed by Southern Pacific Company, excerpts of which are quoted above (Jt.App. 83, 79-80). When he was asked to do something by Southern Pacific personnel, he complied because they were Southern Pacific personnel (Jt.App. 85-86). He quite often saw Elwood Jarvis and followed the instructions and directions that Mr. Jarvis gave (Jt.App.64-65) and that Mr. Jarvis, himself, physically participated in demonstrating to the crew how to unhook the automobiles (Jt.App. 65-66).

Mr. Jarvis was also at the work site daily and knew the witness by his first name (Jt.App. 66). The witness also took directions and instructions from Dick Schriber (Jt.App. 67-68) and John Holland (Jt.App. 63-64) and other Southern Pacific personnel (Jt.App. 71). Mr. Oosterbaan also performed the duties as outlined in the instructional booklet set forth above of placing and removing the flags on the tri-level railroad cars for the purposes of signaling engines (Jt.App. 83-84) and followed directions from switchmen regarding the placement of these flags (Jt.App. 83-84). Mr. Oosterbaan also had occasion to receive a free railroad pass from Southern Pacific (Jt.App. 69-70).

Mr. John Grimaddo, another crew member also took directions and instructions from Mr. Jarvis, Hedland, Holland, Morse, and other Southern Pacific supervisors because if he did not, his job was jeopardized (Jt.App. 56-57; 49-50). Mr. Grimaddo was a member of the Southern Pacific Credit Union and borrowed money from that organization as a benefit of his employment (Jt.App. 50). He also had a permanent free railroad pass (Jt.App. 44).

The petitioner, Eugene C. Kelley, said it was customary to see Southern Pacific personnel at the work site (Jt.App. 133-134). Instructions were taken from Dick Schriber often (Jt.App. 133) and other Southern Pacific personnel and if you did not, you got in "trouble" (Jt.App. 134). He also took instructions from switchmen regarding flagging of the tri-level railroad cars which he was working on (Jt.App. 135-

136). He also borrowed money from the Southern Pacific Credit Union (Jt.App. 134) and had obtained a free railroad pass (Jt.App. 134).

There were also examples of instructional correspondence and directives between officers of Pacific Motor Trucking Company and Southern Pacific Company specifically setting forth instructions regarding the operation and unloading of tri-level railroad cars and safety procedures regarding the raising of the safety railings (see petitioner's exhibits 11, 12, 13, and 16).

Mr. Clayton Calkins testified. He was Manager of Safety and Personnel, for Pacific Motor Trucking Company (Jt.App. 90-91). When he was subpoenaed, he immediately contacted the law department of Southern Pacific Company as was his practice (Jt. App. 88) and this department acted as lawyers interchangeably for Pacific Motor Trucking Company and Southern Pacific Company (Jt.App. 88-89). Mr. Calkins testified regarding the directions he received from the head of the safety department of Southern Pacific relative to personnel unloading automobiles:

> ". . . During the period when tri-level and bi-level operations and piggy back generally was starting there was a great deal of direct relationship between Southern Pacific and PMT for mechanical reasons, for experimental reasons, and for instructional reasons" (Jt.App. 105-106).

Mr. Calkins was aware that Mr. Elwood Jarvis, the supervisor of Damage Prevention and Loading Service, took the instructional booklet, which had

been printed and distributed by Southern Pacific for personnel such as petitioner, down to the unloading area and participated with the personnel in instructing them on how to unhook automobiles (Jt.App. 102). Mr. Elwood Jarvis confirmed these facts in his own testimony (Jt.App. 117-118). In addition, Mr. Calkins had a permanent free railroad pass (Jt.App. 89-90).

With regard to the area where the accident in question occurred, Southern Pacific Company owned and controlled the area surrounding the railroad car in question and Pacific Motor Trucking Company did not own nor control any of the area surrounding the railroad car in question (Jt.App. 126). In fact, Pacific Motor Trucking Company owns no property where railroad track is situated (Jt.App. 125-126).

With regard to the equipment that was used in the process of unloading the automobiles in question, Pacific Motor Trucking Company did not own, rent, or lease any equipment used by personnel in the unloading of automobiles from the tri-level railroad cars (Jt. App. 128-129). Appellant, Southern Pacific Company, owned and manufactured the railroad car in question (Jt.App. 126). The ratchets and chains which were being worked with by petitioner when he fell, as well as the safety railing, were part of and affixed to the railroad car (Jt.App. 56, 59, 78).

With regard to additional responsibility for the unloading of the automobiles, there was no contract between Pacific Motor Trucking Company and Southern Pacific Company whereby Pacific Motor Truck-

ing Company was responsible for damage to the automobiles in the unloading process (Jt.App. 127). Southern Pacific Company has never made a claim against Pacific Motor Trucking Company for damage to automobiles incurred during the unloading process (Jt.App. 127-128). Damage incurred in the unloading process is the responsibility of Southern Pacific Company and damage *after* the unloading process and during delivery is the responsibility of Pacific Motor Trucking Company (Jt.App. 115).

The insurance policies which covered Pacific Motor Trucking Company had as their named insured the appellant, Southern Pacific Company (Jt.App. 125).

As far as the unloading of automobiles was concerned, only Pacific Motor Trucking Company was involved in the unloading process; whereas, after the cars were taken off the railroad cars, other companies also delivered automobiles (Jt. App. 99-100). The rate of income received by Pacific Motor Trucking Company was calculated in one manner for the unloading process and an additional different rate was received for the delivery of the automobiles by truck (Jt.App. 98-99).

The rates which Pacific Motor Trucking Company can charge for delivery over highways is set by the I.C.C. (Jt.App. 102-103). Pacific Motor Trucking Company has no license or authority to transport by railroad (Jt.App. 102).

Pacific Motor Trucking Company, from its highest level down to its lowest, took directions and instructions from Southern Pacific Company, its officers and

employees with regard to operation of tri-level railroad cars.

Central Dispatch, which dispatches the PMT trucks, was a Bureau of Southern Pacific Transportation Department and under the *direct supervision* of Mr. J.J. Willis, a Southern Pacific supervisor (Jt.App. 118-120). Whereas, Pacific Motor Trucking Company had a Safety Program and Instructional Program for its 4,000 drivers, it did not have *any* Safety Program or instructional program for the individuals involved in the unloading of automobiles from the tri-level auto carriers (Jt.App. 103-105).[5]

At the time of the accident, Pacific Motor Trucking Company was a wholly owned subsidiary of appellant, Southern Pacific Company, and had been so wholly owned since 1937 (Jt.App. 2). Three out of the four directors at Pacific Motor Trucking Company were Southern Pacific Company vice-presidents (Jt.App. 1). In 1963, the year of the accident, all five directors of Pacific Motor Trucking Company were officers of Southern Pacific Company (Jt. App. 1).

Operating expenses of Pacific Motor Trucking Company were paid from time to time by appellant, Southern Pacific Company (Jt.App. 2).

At the time of the accident in question, Pacific Motor Trucking Company had contracts, for unloading automobiles, only with Southern Pacific Company (Jt.App. 126-127).

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[5]PMT Safety Dept. has never given any instructions to the personnel unloading autos (Jr.App. 105, 83).

At the time of this accident, Southern Pacific Company had contracts for the unloading of automobiles *only* with Pacific Motor Trucking Company (Jt.App. 127).

VI

THE DISTRICT COURT'S DECISION

Prior to the commencement of the trial, a Motion for Summary Judgment was made by Southern Pacific Company seeking to have the District Court determine, as a matter of law, that petitioner did not qualify as an "employee" within the meaning of the F.E.L.A. This Motion was denied (Jt.App. 24).

Thereafter, a pre-trial order was prepared by attorneys for Southern Pacific Company wherein a single issue of *fact* was set for trial. This issue of fact was the "employee" status within the meaning of F.E.L.A. of petitioner (Jt.App. 23).

Prior to rendering its decision in this matter, the District Court specifically elicited from attorneys of both parties their assurance and understanding that the court would act as the jury, as trier of fact, stating:

> "The Court: All right. As long as I have that understanding, I know—that I didn't want to have any confusion on that arise at any time in the course of the proceedings, because the reason I make this observation, in reading the *Baker* case, for instance, the Supreme Court found it to be a question in a sense for the jury."[6]

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[6]For the complete dialogue regarding the understanding of the parties see excerpt attached hereto as Appendix A.

The District Court then found that petitioner, in performing the work he was doing at the time of the accident in question, was, in fact, in such a relationship to Southern Pacific Company as to be covered by the Federal Employers Liability Act (Finding of Fact IX, Jt.App., p. 30).

Findings of Fact were submitted by both parties and no Findings of Fact were submitted to the District Court requesting that petitioner be found to be an employee of Southern Pacific Company.[7]

The District Court, as trier of fact, found that petitioner was an "employee" of Southern Pacific Company for purposes of F.E.L.A. coverage relying on Restatement, Agency 2d, §220; *Baker v. Texas & Pacific Railroad,* 359 U.S. 227 (1959); *Ward v. Atlantic Coast Line,* 362 U.S. 396 (1960); *Smith v. Norfolk & Western Railway Co.,* 407 F.2d 501 (4th Cir. 1969) (see Jt.App., p. 30).

The District Court, in rendering its informal decision from the bench, prior to the formalization of Findings of Fact and Conclusions of Law, while referring to *Baker v. Texas & Pacific Railroad, supra,* stated:

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[7]The Ninth Circuit Court of Appeals, again, unfortunately, apparently relied on a misstatement in appellate briefs by Southern Pacific Company and concluded the District Court "declined to make a finding proposed by the plaintiff that Kelley was an employee of Southern Pacific Company." This conclusion was apparently based on such an assertion in respondent's reply brief at page 2.

A proposed Conclusion of Law was made by petitioner and a similar Conclusion of Law was made by the District Court (Jt. App. 30, 161).

". . . the Court finds some aid and a guide in the language of the Supreme Court in the Baker case wherein the Court stated: 'It has been well said of the question . . .' and the question they are referring to is the question of the use of the terms 'employee' and 'employed' in the Act.

"Now, to repeat: 'It has been well said of the question that each case must be decided on its peculiar facts. And, ordinarily, no one feature of the relationship is determinative.'

"This language, when justifiably considered with some of the language in the decision in the Smith case, and, particularly, the statement 'operational activity aside, we think the nature of the work being done by Baker for the railroad militates toward a finding of agency on standard agency principles.'

"This language and these guides cause the Court to conclude that on the facts presented and the record made in this case, the Court finds that the work being performed by Eugene C. Kelley on July 3, 1963 was in fulfillment of a nondelegable duty of the railroad which brought him within the traditional agency relationship as a matter of fact. . . ." (Jt.App. 152-153).

VII

THE CIRCUIT COURT OF APPEAL'S DECISION

As set forth above, the Court of Appeals erroneously concluded that the work being performed by petitioner at the time of his injury was not part of the fran-

chise of Southern Pacific Company. Rather, the unloading process was optional with a shipper of automobiles. The evidence was uncontradictingly to the contrary (Jt.App. 128- 5-8). Southern Pacific Company admitted in answer to interrogatories prepared by their attorneys that all rates for inbound movement of automobiles on tri-level cars in July of 1963 included the charge for unloading the automobiles (see Jt.App., pp. 128, 5-8).

In addition, the Court of Appeals erroneously concluded that a Finding of Fact was submitted by petitioner suggesting that he was an "employee" of Southern Pacific Company and this Finding of Fact was rejected by the District Court. The Court of Appeals, using this erroneous conclusion, then hypothesized that the District Court must have based its decision on some other theory.

The Court of Appeals, however, failed to comment on the District Court's reliance on Restatement, Agency, 2d, §220. Further, the Court of Appeals failed to mention the decision of *Ward v. Atlantic Coast Line,* 362 U.S. 396 (1960) which was also specifically relied on by the District Court.

The Court of Appeals also failed to even allude to petitioner's sole argument on appeal that determination of "employee" status, within the meaning of the F.E.L.A., is a question of fact.

The Court of Appeals decision simply ignored the entire concept that "employee" status within the meaning of the F.E.L.A. is a question of fact.

Furthermore, the Court of Appeals simply ignored decisions in five other circuits all of which were directly contrary to the Court of Appeals decision.[8]

Rather, the Court of Appeals chose to be "reinforced" by decisions "in this circuit" which have "rejected the contention that employees of a contractor, engaged by a railroad to perform work that is the railroad's responsibility, become railroad employees *ipso facto.*"

This conclusion of the Court of Appeals not only was not supported by a single case which they relied on,[9] but also is directly contrary to the authorities which were relied on by the District Court and which are clearly the law with regard to whether an employee of an independent contractor can be an "employee" of a railroad within the meaning of F.E.L.A.

The Court of Appeals then also implies there is legislative authority to support the proposition that no persons who are employed by an independent con-

---

[8]See discussion of decisions of the Third, Fourth, Sixth, Seventh, and Tenth Circuits hereinafter set forth.

[9]The four decisions relied on by the Court of Appeals all involved appellate decisions which affirmed District Court conclusions, in weighing the evidence, regarding "employee" status. As discussed hereinafter, the fundamental error of the Court of Appeals was its failure to recognize "employee" status as being a question of fact and their ignoring the "clearly erroneous" rule of FRCP 52(a). In addition, none of the four decisions pertain to facts where an injury occurred during the performance of work which was part of the franchise of the railroad and for which they had been allowed to charge a tariff. For a more detailed discussion regarding the four decisions, see Appendix B attached hereto.

tractor can, under any circumstances, qualify as a "employee" of a railroad for purposes of F.E.L.A.

Petitioner has at no time claimed he was entitled to F.E.L.A. coverage because he was a member of a class or group. Nor does petitioner claim that the District Court's conclusion justifies the inclusion of a class or group within F.E.L.A. coverage.

On the contrary, petitioner claims that he qualifies for coverage under the F.E.L.A. because of the facts and circumstances surrounding the particular accident that he was involved in.

VIII

FEDERAL RULE OF CIVIL PROCEDURE 52(a) PROHIBITS THE APPELLATE COURT FROM REVERSING THE DISTRICT COURT'S FACTUAL CONCLUSION REGARDING F.E.L.A. "EMPLOYEE" STATUS

Federal Rules of Civil Procedure 52(a) prohibits appellate review of factual questions unless there is a *complete* absence of evidence to support the District Court's findings (*United States v. National Association of Real Estate,* 339 U.S. 485, 494-495; *Dennis v. Denver,* 375 U.S. 208, 210; *Atlantic & Gulf v. Ellerman Lines,* 369 U.S. 355, 359; *Commissioner v. Duberstein,* 363 U.S. 278, 290-291).

Appellate review of questions of fact "must be quite restricted", and findings must stand unless clearly erroneous (*Commissioner v. Duberstein,* 363 U.S. 278, 290-291). This rigidity of appellate review, this court has recognized, is so fundamental that it

is set forth in the Seventh Amendment of the United States Constitution (*Atlantic & Gulf v. Ellerman Lines,* 369 U.S. 355, 359) and is applicable even to the United States Supreme Court in those instances where this Court might give the facts a different construction than was given by the District Court (*United States v. National Association of Real Estate,* 339 U.S. 485, 494-495).

In *Baker v. Texas & Pacific Railroad Co.,* 359 U.S. 227, 228 (1959), this Court stated:

> "The Federal Employers Liability Act does not use the terms 'employee' and 'employed' in any special sense, . . . We think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. See Restatement of Agency 2d, §220, comment c; 227, comment a."

In *Ward v. Atlantic Coast Line,* 362 U.S. 820, the injured party was performing work which was the responsibility of an independent contractor and was work being done on a siding privately owned by that independent contractor and used exclusively for the service of that independent contractor. The Supreme Court of the United States, in reversing the Court of Appeals, held that the question of "employee" status of the injured party was a jury question based on Restatement of Agency §220. This Court stated:

> "However, we agree with petitioner's alternative contention that the trial judge erred in refusing to instruct the jury as requested by petitioner,

> . . . as to the factors to be considered by the jury in determining whether the petitioner was an employee of the railroad during the performance of the work within the meaning of the Act. . . . The party's characterization is but one factor to be considered among others, see *Restatement, Agency* 2d §220(2)(i) and the issue is one for determination by the jury on the basis of all relevant factors. *Baker v. Texas & P.R. Co.*, 359 U.S. 227, 3 L.Ed. 2d 756, 79 S. Ct. 664, *supra.* Reversed."[10]

Restatement, Agency 2d, §220 provides:

> "A servant is a person employed to perform services *in the affairs of another,* and who with respect to the physical conduct, and the performance of the services is subject to the other's control or *right* to control." (Emphasis added).

Restatement, Agency 2d, §2 provides:

> "(2) A *servant is an agent* employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." (Emphasis added).

As set forth above, the District Court clearly and explicitly relied on the precise test and standard set

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[10]This Court in *Ward v. Atlantic Coast Line, supra,* rejected petitioner's other contention that he was entitled to recover as a matter of law because the independent contractor was the "agent" of the railroad within the meaning of Section 1 of the F.E.L.A. This contention was rejected because the independent contractor was not performing operational activities required to carry out the franchise of the railroad. The opposite is true in the case at bar. The evidence and findings clearly substantiate that the work being performed by petitioner was in fact required to carry out the franchise of Southern Pacific Company.

forth by the United States Supreme Court in *Baker v. Texas & Pacific Railroad Co., supra; Ward v. Atlantic Coast Line, supra;* and *Restatement of Agency* §220.

The Court of Appeals simply ignored the fact that the District Court had reached a factual conclusion. Rather the Court of Appeals chose to conclude that the District Court had reached a legal conclusion and that this legal conclusion was erroneous. The District Court correctly determined that "employee" status within the meaning of the F.E.L.A. was a factual question.

Because the Court of Appeals misunderstood the issue, they did not attempt to comply with *Federal Rule of Civil Procedure* 52(a) by commenting on the lack of evidence to support the District Court's factual conclusion.

An analysis of the District Court's factual conclusions in comparison to the indicia of *Restatement* §220 shows a definite and specific correlation.[11] The District Court concluded that the responsibility for *immediate* supervision and control of the unloading operations was that of Southern Pacific Company (Jt. App. 29, 30; *Restatement of Agency* 2d, §220(2)(a)). Petitioner was not employed in any type of distinct business or occupation but rather had been employed unloading automobiles for Southern Pacific Company at the same location on a full time basis for a period of eight years and was paid on an hourly

[11]Compare *Restatement*, Agency 2d, §220, comment h.

basis (Jt.App. 28-29; *Restatement of Agency* 2d, §220(2)(b), (d), (f), (g)). The work of unloading the automobiles was part of the regular business of Southern Pacific Company (Jt.App. 30; *Restatement of Agency* 2d, §220(2)(h)). That Southern Pacific Company supplied the instrumentalities, tools, and the place of work for petitioner (Jt.App. 29; *Restatement of Agency* 2d, §220(e)).

This manner of setting forth the Findings of Fact and then specifically citing *Restatement of Agency* 2d §220 can hardly be coincidental particularly when viewed with the fact that petitioner's closing brief, in the District Court, made a specific analysis of comparing the evidence to the *Restatement of Agency* §220. (Cl.Tr. 319-324).*

Notwithstanding this rather clear attempt by the District Court to support the test as dictated by the *Restatement of Agency* 2d, §220, the Court of Appeals concluded the District Court was "not persuaded by the evidence that Kelley was a servant or employee of Southern Pacific in common law conception." Of interest, is the fact that *Restatement, Agency* 2d, §220 is captioned "Who Is a Servant . . . Definition of Servant."

The work being performed by petitioner was of such a nature that respondent, Southern Pacific Company, could not delegate that work as a matter of law. Southern Pacific's franchise responsibilities would necessarily have to be carried out by their "em-

*Cl. Tr. refers to Clerk's Transcript filed with 9th Cir.

ployees." To conclude otherwise would be to conclude that Southern Pacific Company had the power, as well as authority, to delegate portions of their franchise at their whim and at their unbridled discretion.

It was this one aspect alone, of the factors listed in *Restatement of Agency* 2d, §220, which the United States Supreme Court in *Ward v. Atlantic Coast Line, supra,* felt most compelling,[12] as did the 4th circuit in *Smith v. Norfolk & W. Ry., infra.*

IX

REVIEW OF DECISIONS IN OTHER CIRCUITS

The Court of Appeals decision, in the case at bar, is directly contrary to decisions rendered in the Third, Fourth, Sixth, Seventh, and Tenth Circuits. All of these Circuits relied on the very same authorities that were relied on by the District Court in the case at bar.

The Court of Appeals recognized that the *Smith v. Norfolk & W. Ry.,* 4th Cir. 1969, 407 F.2d 501, is factually identical to the case at bar.

The Court of Appeals ignored that certiorari was denied in *Smith v. Norfolk & W. Ry., supra,* (395 U.S. 969, 89 S.Ct. 2134).

Smith v. Norfolk & W. Ry., involved an appeal by the Railroad from a denial of the railroad Motion for Summary Judgment on the question of "employee" status.

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[12]See footnote 10.

The Court of Appeals considered the question of whether or not the existence of an agency relationship between the railroad and the independent contractor would support the applicability of F.E.L.A. coverage to an employee of the independent contractor. This same consideration was given by the Supreme Court of the United States in *Ward v. Atlantic Coast Line, supra.*[13]

However, the Court of Appeals concluded there was no need to decide the correctness of such a theory. The Court stated:

> "We need not decide whether the *Sinkler* doctrine of 'operational activity' properly extends to protect one who is not directly employed by the railroad. See *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3rd Cir. 1965). It is enough here that under traditional agency tests, the decision of the district court that the undisputed facts establish agency does not appear erroneous. In support of that conclusion we need supplement the opinion of the district court only briefly.
>
> "One of the standard tests of agency is 'whether or not the work is part of the regular business of the employer'. Restatement (Second) of Agency §220(h) (1957)."

Of particular interest, *Smith v. Norfolk & W. Ry.* involves facts which are identical to those of the case at bar. In *Smith v. Norfolk & W. Ry. Co.*, the injured party fell while in the process of releasing the restraining chains on an automobile situated on the top level of a tri-level automobile carrier. In con-

[13]See footnote 10.

cluding that the facts surrounding that particular accident met the common law test of "employee" status as defined by the *Restatement, Agency* 2d, §220, the Court of Appeals, as did the District Court in the case at bar, emphasized that one of the tests set forth in the *Restatement, Agency* 2d, §220 is whether the injured party was performing activities that were the regular business of the claimed employer. The Court of Appeals, as did the District Court in the case at bar, felt this fact could hardly be disputed considering that the work being performed was part of the tariff responsibility of the railroad to unload the automobile.

In *Missouri-Kansas-Texas Ry. Co. v. Hearson,* 10th Cir. 1970, 422 F.2d 1037, the Court of Appeals also affirmed the District Court's conclusion that the injured party was an "employee" within the meaning of the F.E.L.A. notwithstanding the fact that he was ostensibly employed by an independent car cleaning contractor.

The Court of Appeals recognized that there was some conflict in the evidence as to whether the common law test of "employee" status, as defined by *Restatement, Agency* 2d, §220. The Court of Appeals, however, went on to agree with the District Court's conclusion that the injured party was an "employee" within the meaning of the F.E.L.A. because the railroad retained the "right of control." Contrary to the Court of Appeals, in the case at bar, the Tenth Circuit recognized there was no conflict in the decisions of any of the Circuits including that of the

Ninth Circuit . t forth in *Dougall v. Spokane, P. & S. Ry.*, (9th Cir., 1953) 207 F.2d 843 and the Fourth Circuit in *Smith v. Norfolk & W. Ry. Co., supra.*

In *Bryne v. Pennsylvania R. Co.* (C.A. 3rd Cir.) 262 F.2d 906, cert. den. 359 U.S. 960, the injured party was an employee of Westinghouse Electric Corporation. He died while working on a locomotive purchased by the Pennsylvania Railroad Company.

The Sixth Circuit, in three separate decisions has supported the District Court's conclusions that an injured employee of an independent contractor which had contracted to unload railroad cars of defendant met the common law test of "employee" status for purposes of F.E.L.A. (see *Cimorelli v. New York Central R. Co.*, 148 F.2d 575; *Pennsylvania R. Co. v. Roth*, 163 F.2d 161; *Pennsylvania R. Co. v. Baralian*, 172 F.2d 710). This Court has cited with approval, on two different occasions, the opinion of *Cimorelli v. New York Central R. Co., supra,* (see *Ward v. Atlantic Coast Line*, 362 U.S. 396, 400; *Baker v. Texas & Pacific Ry. Co., supra*).

In *Schroeder v. Pennsylvania R. Co.*, 397 F.2d 452, the Seventh Circuit also recognized the appropriateness of a District Court's factual conclusion that the common law test of "employee" status provided F.E.L.A. coverage to a decedent killed while unhooking a truck.

The above decisions, with the exception of *Smith v. Norfolk & W. Ry. Co.*, are not factually identical to the case at bar but are in accord with the proposition

that the question of "employee" status is a factual question not to be disturbed on appellate review unless clearly erroneous.

X

COURT OF APPEALS DECISION AS IT WILL AFFECT CASES UNDER THE JONES ACT

There no longer exists any question that decisions rendered under the F.E.L.A., 45 U.S.C. §51 et seq. are applicable and controlling to injuries suffered by seamen under the Jones Act, 46 U.S.C. §688 (*Mitchell v. Trawler Racer,* 362 U.S. 539, 4 L.Ed. 941, 80 S.Ct. 926; *Bell v. Tug Shrike,* 332 F.2d 330, cert. den. 379 U.S. 844, 13 L.Ed.2d 49, 85 S.Ct. 84).

The Court of Appeals decision, in the case at bar, not only is contrary to the authorities previously set forth, but also is irreconcilable with this Court's decision in *Seas Shipping v. Sieracki* (1946) 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872. *Seas Shipping v. Sieracki, supra,* involved a stevedore who sued a ship owner for injuries sustained on board the ship. The question presented was whether the doctrine of the seaworthiness obligation of the owner extended to an employee of an independent contractor. This Court stated:

> "All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other de-

vices which would strip the men performing its service of their historic protection.

"It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights. This is the very basis on which The Jones Act was held applicable to give redress to an injured stevedore in *International Stevedoring Co. v. Haverty,* 149 F.2d 98, 101.

". . . he [the owner] is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought about by model divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities. . . . To allow this would be in substantial effect, to convert the ancient liability for maritime tort into a purely contractual responsibility. *This we are not free to do.*" (emphasis added).

XI

CONCLUSION

The reversal of the Court of Appeals in the case at bar will restore conformity and unanimity to the Circuits. Reversal of the Court of Appeals will also reiterate the importance of restricting appellate review, emphasizing the fundamental value of the trier of fact's unique perspective of evaluating witnesses and presentation of evidence. Reversal of the Court of Appeals will further re-establish this Court's recognition that the Federal Employers Liability Act is

remedial and humanitarian legislation and must be construed liberally (*Urie v. Thompson*, 337 U.S. 163, 182, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949)).

Dated, San Francisco, California,
June 14, 1974.

R. J. ENGEL,
LAW OFFICE
ENGEL & WARNER,
A PROFESSIONAL CORPORATION,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

Thursday, April 16, 1970

The Clerk: Civil Case No. 45344, Kelley v. Southern Pacific Company, further trial.

The Court: All right, gentlemen.

Mr. Engel: Your Honor, this morning I filed the—as long as I had to go ahead and prepare an argument——

The Court: I have read your memo, and I would like to ask you gentlemen a question at the very outset here.

This matter is before me at the present time for a limited purpose, I am correct in that, without saying what it is, for the moment.

Mr. Engel: Yes, Your Honor.

The Court: Did you have a request for a jury trial here?

Mr. Engel: Yes, Your Honor.

The Court: So that presumably if a ruling were in favor of the plaintiffs eventually you would have a jury trial. It it's against the plaintiff, that presumably will end the case.

Mr. Engel: Correct, Your Honor.

The Court: All right. Now, in determining the relationship of Mr. Eugene C. Kelley to the Southern Pacific Company, are you gentlemen in agreement as to whether this is or is not a question for decision by the Court, or are there circumstances under which this may become a question for decision by the jury?

Mr. Corrigan: Well, I believe the pretrial order provides, and we have so agreed in our pretrial statements, that this is a decision for the Court.

The Court: So that to the degree that any facts are involved in rendering that decision, I become the trier of the facts for that purpose?

Mr. Corrigan: Yes, sir.

Mr. Engel: Correct, Your Honor.

The Court: All right.

Mr. Engel: In other words, it was my understanding——

The Court: All right. As long as I have that understanding, I know—that I didn't want to have any confusion on that arise at any time in the course of the proceedings, because the reason I make this observation, in reading the Baker case, for instance, the Supreme Court found it to be a question in a sense for the jury.

Mr. Engel: Well, Your Honor, what we did here is that we bifurcated the trial in fact, and we asked for—there were two factual problems, the one being presented to the Court now, and the other one would be negligence and damages in a subsequent trial.

For this factual question it was agreed that you would be the trier of fact.

The Court: As long as I understand that there is no possible misunderstanding.

Appendix B

The following is a brief summary of the four decisions relied on by the Ninth Circuit Court of Appeal in the case at bar to support their proposition that employees of an independent contractor engaged in work which is the responsibility of the railroad are not covered by F.E.L.A.:

Norman v. Spokane, P.&S. Ry., D. Ore. 1950, 101 F. Supp. 350, aff'd 192 F.2d 1020, cert. den. 342 U.S. 945 (1950): This opinion appeared nine years before the Supreme Court of the United States' decision in *Baker v. Texas & Pac. Ry.,* 359 U.S. 227. It involved an individual working for a bridge repair company who fell from a scaffolding while working on a bridge. The injured party claimed that the railroad had a nondelegable duty.

However, pursuant to stipulation of the parties, the court specifically did not consider whether the injured party met the common law test of "employee." Furthermore, the work being performed by the injured party was not part of the railroad's franchise nor was it part of the tariff responsibility of the railroad.

Dougall v. Spokane, P. & S. Ry., 9th Cir., 1953, 207 F.2d 843: This opinion relying on *Norman v. Spokane, supra,* was also decided before the Supreme Court of the United States decision in *Baker v. Texas & Pac. Ry., supra.* The Appellate Court affirmed the District Court's findings that the injured party working on a roadway was not entitled to F.E.L.A. coverage. The work being performed was not a part of the franchise of the railroad nor was it activity for which the railroad had tariff responsibility.

Tarboro v. Reading Co., 3rd Cir., 1968, 396 F.2d 941, cert. den. 393 U.S. 1027: The Court of Appeals affirmed the District Court findings. The injured party, employed by a freight forwarder, was unloading coal. The railroad did not have the right nor did they in fact particip te in the directions of the injured party, nor control the premises where the work was being performed.

Turpin v. Chicago, B. & O. Ry., Mo. 1966, 403 S.W. 2d 233, cert. den. 384 U.S. 1003: The Appellate Court affirmed the District Court's findings that the evidence did not support the conclusion that the injured party qualified as a "employee" within the meaning of F.E.L.A. The accident in question occurred on the independent contractor's property, there was no railroad supervision, and no evidence of actual or right to control the work being performed by the injured party.

Each of the aforesaid decisions involved a Court of Appeals affirming a District Court's weighing of the evidence and refusing to reverse the District Court's factual conclusion.

These four decisions are the very antithesis of the Court of Appeals conclusions in the case at bar which reversed the District Court's factual conclusion that the test of "employee" status had factually been met by petitioner.

The Court of Appeals decision in the case at bar is an anomaly in that it is the first appellate decision which reverses a District Court's factual conclusion that "employee" status is supported by the evidence.

Appendix C

"The Witness: I can't answer that."

Now, Page 76, Lines 6 through 16. Okay?

"Q. Which one of you fellows would have had the job to put up the safety rails?

"A. Any one of us.

"Q. Now, you said that Pinkston could have called someone else and had it done, is that right?

"A. Yes.

"Q. Who would he have called?

"A. Any of the other drivers that work on the piggyback.

"Q. What drivers, P.M.T. drivers?

"A. Their names?

"Q. P.M.T. drivers?

"A. Yes."

Now, Page 77, Line 16 through Page 78, Line 23:

"Q. Now, were there any other men around there to give you orders on how to do this job other than Pinkston?

"Mr. Engel: This is on the—this is at the time of the accident?

"Mr. Corrigan: At the time of the accident.

"A. Dutch Hauff was there.

"Q. Who was Dutch Hauff? H-a-u--f-f?

"A. I guess—no.